

United States  
Court of Appeals  
for the Ninth Circuit

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MARY NEIL and WILLIAM P. NEIL,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California, Central Division

NOV 30 1951



United States  
Court of Appeals  
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS:

### For Appellants:

PRESTON D. OREM,  
315 West Ninth St., Suite 806,  
Los Angeles 15, Calif.

### For Appellee:

ERNEST A. TOLIN,  
United States Attorney,

E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistants U. S. Attorney,

EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal Revenue,  
600 U. S. Post Office & Court House Bldg.,  
Los Angeles 12, Calif. [1\*]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



In the United States District Court, Southern  
District of California, Central Division

No. 12041—HW

MARY NEIL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES  
ILLEGALLY ASSESSED AND COLLECTED

The above named plaintiff complains of the above  
named defendant and for cause of action alleges:

I.

That this is a cause of actual controversy of a  
civil nature arising under a law of the United  
States providing for internal revenue, to-wit: Sec-  
tions 1 to 322 inclusive of the Internal Revenue  
Code.

II.

That on or about the 15th day of March, 1947,  
plaintiff filed her individual United States Income  
Tax return on Form 1040 with Harry C. Westover,  
the duly qualified and acting Collector of Internal  
Revenue for the above named defendant, in the  
Sixth District of California. That based upon said  
Income [2] Tax return, there was assessed in-  
dividual Federal Income Taxes against the plain-  
tiff in the amount of \$10,974.06 for the calendar

year 1946. That on or about the 15th day of March, 1947, plaintiff paid to the said Collector of Internal Revenue the sum of \$7,935.98, being the last and final payment upon the said assessment of individual Income Taxes for the calendar year 1946 against the plaintiff.

### III.

That on or about the 31st day of October, 1949, said Harry C. Westover ceased to be the Collector of Internal Revenue for the Sixth District of California and at no time since said date has he acted as such.

### IV.

That thereafter, on or about the 15th day of May, 1949, the above named plaintiff filed a claim with the Collector of Internal Revenue for the Sixth District of California for a refund of a portion of individual Income Taxes assessed against her for the Calendar year 1946, upon the grounds that plaintiff's income from the Le Roy D. Owen Company, a co-partnership, had been erroneously over-stated upon plaintiff's individual Income Tax return for the year 1946 and therefore plaintiff had overpaid her Federal Income Taxes for the year 1946 in the amount of \$2,590.89, as shown upon the said refund claim. A copy of the said Claim is attached hereto and marked Exhibit "A".

### V.

That no part of the said sum of \$2,590.89 has been

repaid to plaintiff and that the whole thereof is now owing.

VI.

That more than six months has elapsed since the filing of the said refund claim with the said Collector of Internal Revenue. [3]

Wherefore, plaintiff prays judgment against defendant for the sum of \$2,590.89 together with interest as provided by law from March 15, 1947, for costs of suit and general relief.

Dated: August 3, 1950.

/s/ PRESTON D. OREM,  
Attorney for Plaintiff. [4]



EXHIBIT "A"

## CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ REFUND OR TAX ILLEGALLY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate, gift, or income taxes).

COLLECTOR'S STAMP

(Date received)

STATE OF California }  
COUNTY OF Los Angeles } ss:

Name of taxpayer or  
purchaser of stamps Mary Neil

TYPE  
OR  
PRINT

Business address 4814 Loma Vista Avenue, Los Angeles 11, California  
(Street) (City)

Residence 1441 South Oakland Avenue, Pasadena, California

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named and that the facts given below are true and complete:

- District in which return (if any) was filed Sixth, California
- Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1946 to Jan. 1, 1947
- Character of assessment or tax Overpayment of Income Tax
- Amount of assessment, \$ 7,935.98 : dates of payment March 15, 1947
- Date stamps were purchased from the Government Eighty Nine Cents
- Amount to be refunded Two Thousand Five Hundred Ninety Dollars & 7/10 \$ 2,590.89
- Amount to be abated (not applicable to income, gift, or estate taxes) \$ \_\_\_\_\_
- The time within which this claim may be legally filed expires, under section 322(b) of Internal Revenue Code  
(Revenue Act or Internal Revenue Code)  
on March 15, 1950

The deponent verily believes that this claim should be allowed for the following reasons:

Amended return filed as of the date of this claim which reflects proper taxable income received from Le Roy D. Owen Company for the Year 1946, in accordance with Amended Partnership Return of the Le Roy D. Owen Company filed February 17, 1949

Tax Paid with Original Return	\$7,935.98
Correct Tax Per Amended Return	<u>5,345.09</u>
Refund	<u>\$2,590.89</u>

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this

Signed MARY NEIL

day of \_\_\_\_\_, 19\_\_\_\_

**NOTARIZATION**  
(Signature of officer administering oath)

(Title)

(SEE INSTRUCTIONS ON REVERSE SIDE)





File this return with Collector of Internal Revenue on or before March 15, 1948. Any balance of tax due (item 9, below) must be paid in full with return. See separate instructions for filling out return.

1946  
**1947**

**FORM 1040**  
Treasury Department  
Internal Revenue Service

**U. S. INDIVIDUAL INCOME TAX RETURN**  
**FOR CALENDAR YEAR 1947**

or fiscal year beginning \_\_\_\_\_, 1947, and ending \_\_\_\_\_, 1948

**EMPLOYEES.**—Instead of this form, you may use your Withholding Statement, Form W-2, as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Statements or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

File \_\_\_\_\_  
Code \_\_\_\_\_  
Serial \_\_\_\_\_  
No. \_\_\_\_\_

District \_\_\_\_\_  
(Cashier's Stamp)

Name Mary Neil  
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 1441 South Oakland Ave.  
(PLEASE PRINT. Street and number or rural route)

Pasadena California  
(City or town, postal zone number) (County) (State)

Occupation \_\_\_\_\_ Social Security No. \_\_\_\_\_

**Your Exemptions**

List your own name.  
If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

Name (please print)	Relationship	Name (please print)	Relationship
Your name <u>Mary Neil</u>	<u>XXXXXXXXXX</u>		

List names of other close relatives (as defined in Instruction 1) with 1947 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

**Your Income**

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1947, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming travelling or reimbursed expenses, see Instruction 2.

Print Employer's Name	Where Employed (City and State)	Amount
<u>Wm. P. Neil Co.</u>	<u>Los Angeles, Cal.</u>	<u>\$ 25,000.00</u>
<u>1/2 Community (Wm. P. Neil)</u>		<u>12,500.00</u>

Enter total here → \$ 12,500.00

3. Enter here the total amount of your dividend Directors Fee 1/2 Community 1,525.00

4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation) \_\_\_\_\_

5. If you received any other income, give details on page 2 and enter the total here. 9,728.19

6. Add amounts in items 2, 3, 4, and 5, and enter the total here. \$ 23,753.19

**How to Figure Your Tax**

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

7. Enter your tax from table on page 4, or from line 12, page 3. \$ 8,383.17

8. How much have you paid on your 1947 income tax?  
(A) By withholding from your wages \_\_\_\_\_  
(B) By payments on 1947 Declaration of Estimated Tax \$ 2,273.74  
764.34

Enter total here → 3,038.08

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here. \$ 5,345.09

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here. \_\_\_\_\_

Check ( ) whether you want this overpayment: Refunded to you ☐; or Credited on your 1948 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1945

To which Collector's office was it sent? Los Angeles

To which Collector's office did you pay amount claimed in item 8 (B), above? Los Angeles

Is your wife (or husband) making a separate return for 1947? Yes  
If "Yes," write below: Name of wife (or husband) Wm. P. Neil ("Yes" or "No")

Collector's office to which sent Los Angeles

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) \_\_\_\_\_ (Date) \_\_\_\_\_ (Signature of taxpayer) \_\_\_\_\_ (Date) \_\_\_\_\_

(Name of firm or employer, if any) \_\_\_\_\_ (If this is a joint return of husband and wife, it must be signed by both)



Do not use this page if your income is wholly from salaries, wages, dividends, and interest

## Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in).....	\$.....	4. Total amount received this year.....	\$.....
2. Amount received tax-free in prior years.....		5. Excess, if any, of line 4 over line 3.....	
3. Remainder of your cost (line 1 less line 2).....	\$.....	6. Enter line 5, or 3 percent of line 1, whichever is greater. (Attach separate schedule for each additional annuity or pension)	\$.....

## Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of real or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)
	\$.....	\$.....	\$.....	\$.....
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5).....	\$.....	\$.....	\$.....	\$.....

## Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

State (1) nature of business .....; (2) business name .....

(3) business address .....

Do NOT include in this schedule cost of goods withdrawn for personal use or deductions not connected with business or profession.

1. Total receipts.....	\$.....	
<b>COST OF GOODS SOLD</b> (To be used where inventories are an income-determining factor) (Enter the letters "C" or "I" or "M" on lines 2 and 9 if inventories are valued at either cost, or cost or market, whichever is lower)		
2. Inventory at beginning of year.....	\$.....	
3. Merchandise bought for sale.....		
4. Labor.....		
5. Material and supplies.....		
6. Other costs (explain in Schedule G).....		
7. Total of lines 2 to 6.....	\$.....	
8. Less inventory at end of year.....		
9. Net cost of goods sold (line 7 less line 8).....	\$.....	
10. Gross profit (line 1 less line 9).....	\$.....	
<b>OTHER BUSINESS DEDUCTIONS</b>		
11. Salaries and wages not in line 4.....	\$.....	
12. Interest on business indebtedness.....		
13. Taxes on business and business property.....		
14. Losses (explain in Schedule G).....		
15. Bad debts arising from sales or services.....		
16. Depreciation, obsolescence and depletion (explain in Schedule F).....		
17. Rent, repairs, and other expenses (explain in Schedule G).....		
18. Amortization of emergency facilities (attach statement).....		
19. Net operating loss deduction (attach statement).....		
20. Total of lines 11 to 19.....	\$.....	
21. Total of lines 9 and 20.....	\$.....	
22. Net profit (or loss) (line 1 less line 21).....	\$.....	

## Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exch.....	Exhibit "A" (Cont.)	State Schedule D)
2. Net gain (or loss) from sale or exch.....		

## Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc.....	LeRoy D. Owen Co., I. A.	Amount, \$19,456.39
2. Name and address of estate or trust.....		Amount,
3. Other sources (state nature).....		Amount,
4. Total.....	1/2 community	9,728.19
<b>Total income from above sources (Enter as item 5, page 1)</b>		\$ 9,728.19

## TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income.....	\$23,753.19
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500).....	500.00
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.....	\$23,253.19
4. Enter your exemptions (\$500 for each person whose name is listed in item 1, page 1).....	500.00
5. Subtract line 4 from line 3. Enter the difference here.....	\$22,753.19
6. Use the tax rates in instruction sheet to figure your combined tentative normal tax and surtax on amount entered on line 5. Enter the tentative tax here. (If line 3, above, includes partially tax-exempt interest, see Tax Computation Instructions).....	\$ 8,824.39
7. Enter here 5 percent of amount entered on line 6, above.....	441.22
8. Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax. (If alternative tax computation is made on separate Schedule D, enter here tax from line 12 of Schedule D).....	\$ 8,383.17
IF YOU USED THE \$500 STANDARD DEDUCTION IN LINE 2, DISREGARD LINES 9, 10, AND 11, AND COPY ON LINE 12 THE SAME FIGURE YOU ENTERED ON LINE 1.	
9. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116).....	\$.....
10. Enter here any income tax paid at source on tax-free covenant bond interest.....	
11. Add the figures on lines 9 and 10 and enter the total here.....	
12. Subtract line 11 from line 8. Enter the difference here and in item 7, page 1. This is your tax.....	\$ 8,383.17

Endorsed: Filed Aug. 4, 1950



[Title of District Court and Cause No. 12,041.]

ANSWER

Comes now the defendant in the above-entitled action and, in answer to plaintiff's complaint herein, admits, denies and alleges:

I.

Denies the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that defendant denies that there was assessed individual federal income taxes against the plaintiff in the amount of \$10,974.06.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Denies the allegations contained in paragraph IV thereof, except that defendant admits that on or about the 15th day of May, 1949, the plaintiff filed a claim for refund of a portion of the individual income taxes assessed against [10] her for the calendar year 1946. Defendant denies the allegations contained in said refund claim, Exhibit A attached to her complaint.

V.

Denies the allegations contained in paragraph V

thereof, except that defendant admits that no part of said sum claimed has been repaid.

## VI.

Admits the allegations contained in paragraph VI thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,  
United States Attorney,  
E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistant U. S. Attorneys,  
EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal Revenue.

/s/ E. H. MITCHELL,  
Attorneys for Defendant. [11]

Affidavit of Service by Mail attached. [12]

[Endorsed]: Filed Nov. 9, 1950.



In the United States District Court, Southern  
District of California, Central Division

No. 12042—Y

WILLIAM P. NEIL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES  
ILLEGALLY ASSESSED AND COLLECTED

The above named plaintiff complains of the above  
named defendant and for cause of action alleges:

I.

That this is a cause of actual controversy of a  
civil nature arising under a law of the United  
States providing for internal revenue, to-wit: Sec-  
tions 1 to 322 inclusive of the Internal Revenue  
Code.

II.

That on or about the 15th day of March, 1947,  
plaintiff filed his individual United States Income  
Tax return on Form 1040 with Harry C. Westover,  
the duly qualified and acting Collector of Internal  
Revenue for the above named defendant, in the  
Sixth District of California. That based upon said  
Income [13] Tax return, there was assessed in-

dividual Federal Income Taxes against the plaintiff in the amount of \$10,974.06 for the calendar year 1946. That on or about the 15th day of March, 1947, plaintiff paid to the said Collector of Internal Revenue the sum of \$7,935.98, being the last and final payment upon the said assessment of individual Income Taxes for the calendar year 1946 against the plaintiff.

### III.

That on or about the 31st day of October, 1949, said Harry C. Westover ceased to be the Collector of Internal Revenue for the Sixth District of California and at no time since said date has he acted as such.

### IV.

That thereafter, on or about the 15th day of May, 1949, the above named plaintiff filed a claim with the Collector of Internal Revenue for the Sixth District of California for a refund of a portion of individual Income Taxes assessed against him for the calendar year 1946, upon the grounds that plaintiff's income from the LeRoy D. Owen Company, a co-partnership, had been erroneously over-stated upon plaintiff's individual Income Tax return for the year 1946 and therefore plaintiff had overpaid his Federal Income Taxes for the year 1946 in the amount of \$2,590.89, as shown upon the said refund claim. A copy of the said Claim is attached hereto and marked Exhibit "A".



V.

That no part of the said sum of \$2,590.89 has been repaid to plaintiff and that the whole thereof is now owing.

VI.

That more than six months has elapsed since the filing of the said refund claim with the said Collector of Internal Revenue. [14]

Wherefore, plaintiff prays judgment against defendant for the sum of \$2,590.89 together with interest as provided by law from March 15, 1947, for costs of suit and general relief.

Dated: August 3, 1950.

/s/ PRESTON D. OREM,  
Attorney for Plaintiff. [15]

[Printer's Note: Exhibit "A" is identical to Exhibit "A" photostated at pages 6-8 of this printed Record, except for name William P. Neil appearing in place of Mary Neil.]

[Endorsed]: Filed Aug. 4, 1950.

[Title of District Court and Cause No. 12,042.]

## ANSWER

Comes now the defendant in the above-entitled action and, in answer to plaintiff's complaint herein, admits, denies and alleges:

### I.

Denies the allegations contained in paragraph I thereof.

### II.

Admits the allegations contained in paragraph II thereof, except that defendant denies that there was assessed individual federal income taxes against the plaintiff in the amount of \$10,974.06.

### III.

Admits the allegations contained in paragraph III thereof.

### IV.

Denies the allegations contained in paragraph IV thereof, except that defendant admits that on or about the 15th day of May, 1949, the plaintiff filed a claim for refund of a portion of the individual income taxes assessed against [21] him for the calendar year 1946. Defendant denies the allegations contained in said refund claim, Exhibit A attached to his complaint.

### V.

Denies the allegations contained in paragraph V thereof, except that defendant admits that no part of said sum claimed has been repaid.

VI.

Admits the allegations contained in paragraph VI thereof.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,  
United States Attorney,  
E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistant U. S. Attorneys,  
EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal Revenue.

/s/ E. H. MITCHELL,  
Attorney for Defendant. [22]

Affidavit of Service by Mail attached. [23]

[Endorsed]: Filed Nov. 9, 1950.

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At a stated term, to-wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 8th day of January in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Causes Nos. 12,041-12,042.]

### MINUTE ORDER

For setting; Preston D. Orem, Esq., appearing as counsel for plaintiffs; E. H. Mitchell, Ass't U. S. Att'y, appearing as counsel for Gov't;

Court orders these causes consolidated for trial and sets trial for April 2, 1951, 10 a.m. [24]

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At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 2nd day of April in the year of our Lord one thousand nine hundred and fifty-one.

Present:

The Hon. Harry C. Westover, District Judge.

[Title of Causes Nos. 12,041-12,042.]

### MINUTE ORDER

For consolidated trial; P. D. Orem, Esq., appearing as counsel for plaintiff; Frank W. Mahoney, Ass't U. S. Att'y, appearing as counsel of Gov't; stipulation of facts is presented and filed.

Counsel state no objection to the Court's hearing the matter.

Court orders cause continued to April 3, 1951, 10 a.m., for trial. [25]

[Title of District Court and Causes 12,041-12,042.]

## STIPULATION OF FACTS

It Is Hereby Stipulated by and between the parties hereto that the following facts shall be taken as true, provided, however, that this stipulation does not waive the rights of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

### I.

That these are causes of actual controversy arising under laws of the United States providing for internal revenue.

### II.

That at all times since January 1, 1943, both of the plaintiffs have been, and now are individuals residing, and having their principal place of business, within the County of Los Angeles, State of California.

### III.

That at all times since January 1, 1943, plaintiff Mary Neil has been, and now is, the wife of plaintiff William P. Neil.

### IV.

That all taxable income of William P. Neil and Mary Neil for the calendar year 1946 was, and is, community income under the laws of the State of California.

## V.

That at all times from July 1, 1943, to October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California.

## VI.

That plaintiffs filed their separate original individual income tax returns for the calendar year 1946 on March 15, 1947, in the Sixth District of California. That a certified copy of the said return of plaintiff Mary Neil is attached hereto, marked Exhibit 1, and showing a total income tax liability of \$10,974.06, of which \$3,038.08 was paid by withholding from wages and on Declaration of Estimated Tax, and the balance of \$7,935.98 paid on March 15, 1947. That a certified copy of the said return of plaintiff William P. Neil is attached hereto, marked Exhibit 2, and showing the same total income tax and deductions for taxes paid, and payment of the balance of income taxes on March 15, 1947, of \$7,935.98. That upon Exhibits 1 and 2, respectively, each of the plaintiffs reported in Schedule E thereof, \$14,284.10, and \$14,284.11, as income for the partnership of "Le Roy D. Owen Co."; the total reported upon both returns being \$28,568.21.

## VII.

That plaintiff William P. Neil and Le Roy D. Owen were at all times during the period from December 1, 1943, to September 30, 1946, partners in a real estate brokerage business under the name of "Le Roy D. Owen Company"; that the original



Articles of Limited Partnership, and a copy of the assignment of partnership interest, are attached hereto as Exhibit 3. That at all times during the life of the said partnership, Le Roy D. Owen was the only general partner, and William P. Neil was the only limited partner. That at all times during the life of the partnership, the books and assets were kept at the principal place of business, 621 South Hope Street, Los Angeles, California, and were in the custody of the general partner.

### VIII.

That at no time was the said partnership licensed to do a real estate brokerage business by the Division of Real Estate of California; that at all times during the period from December 3, 1943, to September 30, 1946, Le Roy D. Owen, held a real estate broker license, doing business as "Le Roy D. Owen Co."; and transacted the real estate brokerage business of the said partnership under such individual license.

### IX.

That the original partnership capital consisted wholly of \$5,000 in cash contributed by William P. Neil during the month of December 1943, in accordance with Article VI of the certificate of Limited Partnership (Exhibit 3). That during the calendar year 1944, William P. Neil advanced or contributed the additional sum of \$3,000 to the partnership which sum was returned to him by the partnership prior to September 30, 1946. That the original in-

vestment of \$5000 was returned by the partnership to William P. Neil prior to September 30, 1946, together with \$1007 representing interest at the rate of 5% per annum upon the \$8000 contributed by William P. Neil.

### X.

That the partnership income tax returns for the calendar years 1943, 1944 and 1945 filed by the partnership in the Sixth District of California reported net taxable distributive income and losses of William P. Neil as follows:

Year	Amount
1943	Loss .....\$ 303.35
1944	Income ..... 1,809.14
1945	Income ..... 6,909.28
<hr/>	
Total Net Income....\$8,415.07	

That the books of the partnership for the years 1943, 1944 and 1945 reflect net taxable distributive income and losses of William P. Neil of the same amounts as shown by the said partnership returns for the years 1943, 1944 and 1945.

### XI.

That a partnership income tax return for the calendar year 1946 was filed in the Sixth District of California on February 18, 1949, by William P. Neil, a certified copy of which is attached hereto is Exhibit 4. The books of the partnership show a net income of the partnership for the year 1946 to be the sum of \$63,719.67.



## XII.

That other than the returns of capital investments of \$8000 set forth in paragraph IX herein, the only distribution by the partnership to William P. Neil during the period from December 1, 1943, to September 30, 1946, was \$1,007.00 as interest on capital investment which William P. Neil received on September 11, 1946, as set forth in said paragraph IX.

## XIII.

That after the dissolution of the said partnership on September 30, 1946, William P. Neil received the following distributions from the partnership on or about November 21, 1946, said distributions being made by Le Roy D. Owen:

Cash—\$3,505.87

Corporation stocks:

75 shares of Dorrington, Inc.

100 shares of The Black & Decker Manufacturing Company

50 shares of Bullocks, Inc.

100 shares of International Detrola Corporation (name now changed to Newport Steel Company)

200 shares of Sun Chemical Corporation

100 shares of Tidewater Associated Oil Company.

## XIV.

That the foregoing distributed corporation stocks

were purchased for cash by the partnership and carried upon the books at cost, as follows:

	Date of Purchase	Cost
Dorrington, Inc.—75 shares.....	August 14, 1946	\$7,500.00
The Black & Decker Manufacturing Company—100 shares.....	May 31, 1946	4,473.93
Bullocks, Inc.—50 shares.....	May 27, 1946	2,687.50
International Detrola Corporation— 100 shares .....	May 24, 1946	1,917.55
Sun Chemical Corporation—200 shares....	July 3, 1946	4,423.77
Tidewater Associated Oil Co.— 100 shares.....	July 3, 1946	2,355.84
Total Cost .....		<hr/> \$23,358.59

## XV.

That on March 7, 1947, William P. Neil filed an action No. 526479, for money due on contract, against Le Roy D. Owen in the Superior Court of the State of California in and for the County of Los Angeles; that on February 7, 1949, judgment was entered in favor of the defendant; Allen W. Ashburn, Judge, ruling that the third amended complaint failed to state a cause of action; that plaintiff filed an appeal in the District Court of Appeal of the State of California, Second Appellate District; that on October 4, 1949, the parties moved to dismiss the appeal after payment of \$1000 by defendant Le Roy D. Owen to plaintiff William P. Neil; that a certified copy of the Clerk's Transcript on appeal is attached hereto as Exhibit 5, and a copy of the Reporter's transcript on Appeal is attached hereto as Exhibit 6.

## XVI.

That attached hereto as Exhibit 7 is a certified copy of a claim for refund filed on May 15, 1949, by Mary Neil in the Sixth District of California; that attached hereto as Exhibit 8 is a certified copy of a claim for refund filed on May 13, 1949, by William P. Neil in the Sixth District of California. That said refund claims are those referred to in Paragraph IV of the respective complaints of plaintiffs in these actions.

## XVII.

That attached hereto as Exhibit 1 is a certified copy of an amended individual income tax return of Mary Neil for the calendar year 1946; that attached hereto as Exhibit 2 is a certified copy of an amended individual income tax return of William P. Neil for the calendar year 1946.

## Schedule of Exhibits

1. Certified copy of original and amended individual income tax return of *Mary* Neil for calendar year 1946.
2. Certified copy of original and amended individual income tax return of William P. Neil for calendar year 1946.
3. Articles of Limited Partnership and Assignment of Partnership Interest.
4. Certified copy of partnership income tax return for the calendar year 1946.
5. Certified copy of Clerk's Transcript on Ap-

peal in Action No. 526,479—Neil vs. Owen—Superior Court of Los Angeles County.

6. Copy of Reporter's transcript on appeal in Action No. 526,479.

7. Certified copy of claim for refund of income taxes of Mary Neil, year 1946.

8. Certified copy of claim for refund of income taxes of William P. Neil, year 1946.

Dated: April 2, 1951.

/s/ PRESTON D. OREM,  
Attorney for Plaintiff.

ERNEST A. TOLIN,  
United States Attorney,  
E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistant U. S. Attorneys,  
EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal Revenue,  
By EUGENE HARPOLE.

[Endorsed]: Filed April 2, 1951.

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[Title of District Court and Causes 12,041-12,042.]

## OPINION

Plaintiff William P. Neil and LeRoy D. Owen were partners in a real estate brokerage business, doing business under the name of "LeRoy D. Owen Company." Le Roy D. Owen was the only general partner and William P. Neil the only limited part-

ner. The partnership was not licensed by the Division of Real Estate of the State of California to do a real estate [26] brokerage business; but LeRoy D. Owen held a real estate broker's license, doing business as LeRoy D. Owen Company.

A partnership income tax return was filed for the year 1946, which disclosed the income of the partnership for such year as \$63,719.67. The partnership was dissolved on September 30, 1946, and William P. Neil received certain assets of the copartnership upon its dissolution. Using the basis of the partnership net income for the year 1946 of \$63,719.67, William P. Neil and his wife filed individual income tax returns, reporting income from the partnership as \$14,284.11 each.

Subsequent to the dissolution of partnership LeRoy D. Owen failed and refused to pay or turn over to William P. Neil some of the assets of the copartnership which were to have been delivered to him upon its dissolution. On March 7, 1947, William P. Neil filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, against LeRoy D. Owen for money due on the dissolution contract, and on September 7, 1949, judgment was entered in favor of the defendant, inasmuch as it appeared plaintiff in the action was not a real estate broker licensed by the State of California and approximately 95% of the income of "LeRoy D. Owen Company," a copartnership, during the year 1946 was from commissions on real estate sales. The Judgment in the Superior Court has become final.



After rendition of Judgment, plaintiffs herein filed amended income tax returns for the year 1946, reducing the amount of income from the partnership to the amount actually received. A claim for refund (Form 843) was filed by taxpayers with the Internal Revenue Department, based on the amended income tax filings. Before the Commissioner of Internal Revenue acted upon the claims (and after expiration of [27] six months) the complaints were filed herein.

Plaintiff William P. Neil contends that inasmuch as he did not actually receive the money reported as having come to him from the partnership, he and his wife should not be required to pay tax thereon.

The government contends the tax is due, inasmuch as the income was earned income.

“Income taxes must be paid on earned income.” (U.S.A. vs. Ellis R. Lewis, Supreme Court No. 347, October Term, 1950.)

Plaintiffs in their brief cite to the Court the various provisions of the Business & Professions Code of California relative to the inability of one who is not a duly licensed real estate agent or broker to collect commissions or fees earned when he does not have such license.

Section 10136 of the Business & Professions Code of the State of California provides that:

“\* \* \* no person engaged in the business or acting in the capacity of a real estate broker or real estate salesman within this State shall

bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.” (Emphasis supplied.)

It will be noted the section does not say such compensation was not “earned” income. It says only that no action shall be maintained for collection thereof. [28]

The Business & Professions Code does not anywhere declare fees or compensation of an unlicensed broker or salesman are not income but states only that the courts shall not be used for collection of such fees or compensation; or that it shall be unlawful to divide a real estate agent's or broker's commission with a non-licensed person.

The Superior Court refused to allow plaintiff William P. Neil to maintain the action filed to collect money alleged to be due, on the ground that plaintiff could not allege and prove he was a duly licensed real estate broker at the time the alleged cause of action arose.

Although we feel that the equities are with the plaintiffs in this action and they should not be called upon to pay tax on income which they did not actually receive or benefit from, nevertheless the law is well established that although income is not actually received, taxpayers are required to pay tax

if the income is earned income. There is no question here but that the income was actually earned.

Judgment will be rendered in favor of defendant; defendant to prepare Findings of Fact, Conclusions of Law and Judgment in conformity herewith.

Dated this 17th day of May, 1951.

/s/ HARRY C. WESTOVER,

District Judge.

[29]

[Endorsed] Filed May 17, 1951.

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[Title of District Court and Causes 12,041-12,042.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The within causes came on regularly to be heard on April 3, 1951, before the Honorable Harry C. Westover, District Judge, sitting without a jury. The plaintiffs were represented by their attorney, Preston D. Orem, and defendant was represented by its attorneys, Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole and Frank W. Mahoney, Special Attorneys for the Bureau of Internal Revenue. The matter having been submitted on a written Stipulation of Facts and oral testimony and oral and written argument, and the Court being duly advised and hav-



ing heretofore filed herein its written [30] Opinion now makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

### I.

That plaintiff William P. Neil and LeRoy D. Owen were at all times during the period from December 1, 1943 to September 30, 1946, partners in a real estate brokerage business under the name of Le Roy D. Owen Co. Le Roy D. Owen was the only general partner and William P. Neil was the only limited partner.

### II.

That at no time was the said partnership licensed to do a real estate brokerage business by the Division of Real Estate of California; that at all times during the period from December 3, 1943, to September 30, 1946, Le Roy D. Owen, held a real estate broker license, doing business as "Le Roy D. Owen Co."; and transacted the real estate brokerage business of the said partnership under such individual license.

### III.

That the original partnership capital consisted wholly of \$5,000 in cash contributed by William P. Neil. That during the calendar year 1944 William P. Neil advanced the additional sum of \$3,000 to the partnership, which sum was returned prior to September 30, 1946. The original investment of \$5,000 together with \$1,007 representing interest on said sum was returned prior to September 30, 1946.

## IV.

That the partnership was dissolved on September 30, 1946, by virtue of an oral agreement of the partners.

## V.

That the net income for the partnership for the period January 1, 1946 to September 30, 1946 was the sum of \$63,719.67. That pursuant to the articles of partnership \$28,568.21 of said income was distributable to William P. Neil.

## VI.

That \$14,284.10 of said income was reported by each of the plaintiffs [31] herein in their original individual income tax returns for the calendar year 1946.

## VII.

That on March 3, 1947, William P. Neil filed an action in the Superior Court of the State of California for the County of Los Angeles against Le Roy D. Owen for the recovery of certain assets of the partnership due to Neil by virtue of the dissolution agreement.

## VIII.

That in February, 1949, the Superior Court action terminated in a Judgment for partner Owen.

## IX.

That thereafter on May 13, 1949, plaintiffs filed a claim for refund alleging the distributive share of the partnership income of William P. Neil to be \$19,456.39.

## X.

That all taxable income of William P. Neil and Mary Neil for the calendar year 1946 was, and is, community income under the laws of the State of California.

## CONCLUSIONS OF LAW

## I.

That the income of the plaintiffs from the partnership was correctly reported in the original individual income tax return filed by them on March 15, 1947.

## II.

That the earned income of the partnership for the year 1946 was \$63,719.67 and that the distributive share of said earned income of William P. Neil was \$28,568.21 of which each of the plaintiffs herein properly reported the sum of \$14,284.10 and \$14,283.11 respectively as taxable income under the provisions of Sections 180 to 183 of the Internal Revenue Code.

## III.

That the refusal of the Superior Court of the State of California to enforce the dissolution agreement of the parties had no effect upon their [32] federal tax liability.

## IV.

That the income taxes for the calendar year 1946 were properly collected from William P. Neil and Mary Neil.

It Is Therefore Ordered and Decreed:

1. That plaintiffs take nothing by their complaint.

2. That defendant have judgment against Plaintiff and costs of suit incurred.

Dated: This 7th day of June, 1951.

/s/ HARRY C. WESTOVER,  
United States District Judge. [33]

Affidavit of Service by Mail attached. [34]

[Endorsed]: Filed June 7, 1951.

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In the United States District Court, Southern  
District of California, Central Division

No. 12,041—HW

MARY NEIL, Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

WILLIAM P. NEIL, Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

### JUDGMENT

The within causes came on regularly to be heard in the above entitled Court on April 3, 1951, the Honorable Harry C. Westover presiding without a jury. The plaintiffs were represented by their attorney Preston D. Orem, and defendant represented

by its attorneys Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole and Frank W. Mahoney, Special Attorneys for the Bureau of Internal Revenue; and the Court having considered all the facts and evidence presented and having heard the argument of counsel and having heretofore caused its written Opinion and Findings of Fact and Conclusions of Law to be filed, now renders its Judgment: [35]

It Is Therefore Ordered, Adjudged and Decreed:

That plaintiffs recover nothing by their complaints; and that defendant recover judgment from the plaintiffs for its costs of suit incurred to be fixed by the clerk of this Court in the sum of \$20.00 in each case.

Dated: This 7th day of June, 1951.

/s/ HARRY C. WESTOVER,  
United States District Judge.

Judgment entered June 7, 1951. [36]

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Causes 12,041-12,042.]

NOTICE OF MOTION TO VACATE  
JUDGMENT

To Defendant herein and to Ernest A. Tolin, E. H. Mitchell, Edward R. McHale, Eugene Harpole and Frank W. Mahoney, attorneys for Defendant:

You will please take notice that on Monday, the 25th day of June, 1951, at the hour of 10:00 a.m., in the courtroom of Judge Harry C. Westover, District Judge of the above-entitled court, defendant will move the court to vacate and set aside the judgment heretofore made and entered against the plaintiffs.

Said motion will be made upon the ground that Judge Harry C. Westover, who presided at the trial of this action, was disqualified [38] to try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code.

Dated this 12th day of June, 1951.

/s/ PRESTON D. OREM,  
Attorney for Defendant. [39]

Points and Authorities

Title 28, Section 455, Federal Judicial Code. "Interest of justice or judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been



of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein" (June 25, 1948, C. 646, No. 1, 62 Stat. 908).

Even although the parties to the action attempt to waive the disqualification, there can be no waiver if the disqualification is based on absolute prohibition in a statute against a disqualified judge sitting in the case. 48 C.J.S. 1101. The foregoing section 455 contains both a mandatory disqualification, and a discretionary disqualification.

Where a district judge had been counsel for a party in the case pending before him, his disqualification was not a matter for the exercise of his own discretion but was unconditional and absolute. *U. S. vs. Vasilick* (CCA 3) 160 Fed. (2d) 631, reversing 68 F. Supp. 725. In this case, the district judge had been district attorney at the time of the trial and conviction of the defendant. A district attorney is "of counsel" in all cases in his district. As a judge, he could not act upon a motion to vacate judgment, the order denying the motion was vacated and the case remanded for consideration by another district judge.

Where a judge was related to a party to the action within the fourth degree of consanguinity, the consent of all [40] parties to the action did not remove the disability, and he was disqualified to act.



In re Eatonton Electric Co. (D.C.Ga.) 120 Fed. 1010.

The Commissioner shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified. (Section 3641, Internal Revenue Code.)

“That at all times from July 1, 1943, to October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California.” (Stipulation of Facts—Paragraph V, on page 2). Thus, the judge in this case was charged with the duty of collecting the very income tax assessments for the year 1946, upon the alleged overpayment of which, plaintiffs have based these actions.

Therefore, Judge Harry C. Westover, as said Collector of Internal Revenue, had a “substantial interest” in the collection of the income taxes to which this case relates, and was also an employee and agent of defendant in the collection of the said taxes. As such, he could be said to have been “of counsel” for the defendant in this issue. Under Section 455, previously cited, the mandatory disqualification of the said trial judge is apparent. [41]

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1951.

[Title of District Court and Causes 12,041-12,042.]

## NOTICE OF MOTION FOR NEW TRIAL

To Defendant herein and to Ernest A. Tolin, E. H. Mitchell, Edward R. McHale, Eugene Harpole and Frank W. Mahoney, attorneys for defendant:

You will please take notice that on Monday, the 25th day of June, 1951, at the hour of 10:00 a.m., in the courtroom of Judge Harry C. Westover, District Judge of the above-entitled court, defendant will move the court for a new trial in the above-entitled cause for the following reasons:

1. The proceedings were irregular in that the trial judge was disqualified to act as such under the provisions of [43] section 455 of Title 28 of the Federal Judicial Code, as fully set forth in the "Notice of Motion to Vacate Judgment" filed concurrently herewith.

2. The evidence was insufficient to justify the decision in that:

- (a) The court appears to have based its decision upon the fact that the partnership income in question was "earned" by plaintiff William P. Neil (Opinion, line 8 on page 3; line 17, on page 4). There is no evidence whatsoever in support of the premise that William P. Neil, as a limited partner supplying capital only, "earned" any portion whatever of the partnership income during the calendar year 1946, or at any time during the existence of the said partnership.

3. The opinion of the court is contrary to law in that:

(a) The court states that "the equities are with the plaintiffs in this action". Therefore, the decision should also favor the plaintiffs. "The law respects form less than substance". 19 AM. Jur. 317.

(b) The decision appears to be based upon a misconception of the decision in the case of *United States vs. Lewis*, 71 S. Ct. 522 (March 26, 1951). In the *Lewis* case, *Lewis* did receive income "under a claim of right" although in a later year, he was required to refund the income in question to his employer. In this case, *Neil* did not receive the partnership income "under a claim of right", but his partner *Owen* retained the said income "under a claim of right". At no point in the *Lewis* decision does the Supreme Court even mention the word "earned" or the phrase "earned income".

(c) The decision mentions Section 10136 of the Business & Professions Code of the State of California relating to actions for commissions by unlicensed real estate [44] brokers, but omits to mention the succeeding Section 10137 which states, in part, "It shall be unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesman licensed under the broker employing or compensating him". Section 10137 clearly ascribes to *Le Roy D. Owens*, as earned income, those real estate commissions constituting 95% of the partnership in-

come in that it prohibits directly the sharing of such commissions by Owen with an unlicensed person (Neil).

Dated this 12th day of June, 1951.

/s/ PRESTON D. OREM,

Attorney for Plaintiffs. [45]

Affidavit of Service by Mail attached. [46]

[Endorsed]: Filed June 14, 1951.

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[Title of District Court and Causes 12,041-12,042.]

NOTICE OF MOTION TO AMEND FINDINGS  
OF FACT AND CONCLUSIONS OF LAW

To Defendant herein and to Ernest A. Tolin, E. H. Mitchell, Edward R. McHale, Eugene Harpole and Frank W. Mahoney, attorneys for defendant:

You will please take notice that on Monday, the 25th day of June, 1951, at the hour of 10:00 a.m., in the courtroom of Judge Harry C. Westover, District Judge of the above-entitled court, defendant will move the court for an order amending its findings of fact and conclusions of law in the following respects:

1. By striking from paragraph V of the findings of fact at line 29, page 2, the word "\$28,568.21" and inserting [47] the word "\$19,456.39", and by striking from the same said paragraph and line, the word "distributable" and inserting the word "distributed". The foregoing proposed changes are

based upon the grounds that under the laws of the State of California relating to real estate brokerage partnerships, the partnership income was "distributive" only to Le Roy D. Owen. However, Le Roy D. Owen did "distribute" to plaintiff the sum of \$19,456.39. Reference is made at this point to the argument and authorities appearing in plaintiff's opening brief, from line 14, page 7, to line 17, page 11, inclusive. Also, further, to the argument and authorities appearing in plaintiff's reply brief, from line 13, page 2, to line 15, page 4, inclusive.

2. By inserting in the Findings of Fact at the beginning thereof, line 3, page 2, paragraphs I, II, III, V and VI of the "Stipulation of Facts" filed herein by the parties hereto. Such insertion should be made upon the grounds that the present Findings of Fact are deficient and incomplete in that it cannot be ascertained therefrom the following stipulated facts:

(a) That the controversy arises under laws of the United States providing for internal revenue (see Stipulation of Facts, I).

(b) That plaintiffs resided within the Sixth District of California (Stipulation of Facts, II).

(c) That plaintiffs were, and are, husband and wife (Stipulation of Facts, III).

(d) That at all times during the calendar year 1946, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California (Stipulation of Facts, V).

(e) That plaintiffs filed their individual income tax returns for the year 1946 in the Sixth District



of California (Stipulation of Facts, VI). [48]

3. By adding to Paragraph I of the findings of fact, the following statements: "That at all times during the life of the partnership, the books and assets were in the custody of the general partner, Le Roy D. Owen" (See paragraph VII of the "Stipulation of Facts"). "That at all times during the life of the partnership, all securities owned by the partnership were held in the name of 'Le Roy D. Owens' as evidenced by the corporation stock certificates therefor" (see opening brief for plaintiffs, lines 9 to 13, page 6). That the basis for said proposed additions is that the foregoing statements are extremely material to the decision of the principal issues herein, and their omission causes the Findings of Fact to be misleading, incomplete and supportive of erroneous conclusions of law.

4. By inserting in the Findings of Fact, Paragraph X of the "Stipulation of Facts" upon the grounds that such paragraph is an essential factual statement necessary for the computation of partnership net income distributed to plaintiffs during the calendar year 1946.

5. By adding an additional paragraph as follows: "That a partnership income tax return for the calendar year 1946 was filed in the Sixth District of California, on February 18, 1949 (see Stipulation of Facts, paragraph XI). "That such partnership income tax return reported net income distributive to partners as follows: Le Roy D. Owen, \$44,263.28; William P. Neil, \$19,456.39; total, \$63,719.67." (Exhibit 4). That the inclusion of the foregoing paragraph is essential to show that a partner-

ship income tax return was filed for the year 1946, and the distribution of the partnership income thereon.

6. By inserting in the Findings of Fact at the end thereof, paragraphs XII, XIII, XIV and XV of the "Stipulation of Facts". Such insertion should be made upon the grounds that [49] the present Findings of Fact are deficient and incomplete in that it cannot be ascertained therefrom the following material stipulated facts:

(a) The distributions of partnership assets by Le Roy D. Owen to William P. Neil during the calendar year 1946 (Stipulation of Facts, XII and XIII).

(b) The cost basis to the partnership of the securities so distributed (Stipulation of Facts, XIV).

(c) The material facts concerning the action by William P. Neil against Le Roy D. Owen in the state courts of California (Stipulation of Facts, XV).

7. By inserting in the Findings of Fact as an addition to the present paragraph II thereof the following: "That William P. Neil at no time during the existence of the partnership held a real estate brokerage license" (Opinion, lines 21 and 22, page 2; Exhibit 5). The inclusion of this sentence is requested upon the grounds that it is essential and material to properly complete the facts now stated in paragraph II of the Findings of Fact.

8. By inserting in the Findings of Fact as an addition to the present paragraph V thereof after the word "63,719.67" on line 28, page 2, the following: Approximately 95% of the said income of the



said partnership was from commissions on real estate sales.” (Opinion, lines 22 to 24, page 2). “The laws of the State of California specifically prohibited the payment of any part of income of the partnership from commissions on real estate sales to William P. Neil” (Section 10137, Business and Professional Code of the State of California). The inclusion of the foregoing is material and essential to properly complete the facts now stated in paragraph V of the Findings of Fact.

9. By striking the entire Findings of Fact upon the grounds there was evidence before the court from which it was [50] required to make findings which would countervail its other findings. 64 C.J. 1232; *Chambers vs. Farnham*, 179 p. 4, 23, 39 Cal. App. 17.

10. By amending the Findings of Fact so as to cover all material issues of fact raised by the pleadings and evidence and in respect of which findings are necessary to support the judgment. 64 C.J. 1232, 1233.

11. By striking from the Conclusions of Law, paragraph I, the word “correctly” and inserting the word “incorrectly” upon the grounds that upon the facts and evidence presented, the plaintiffs erroneously reported their taxable income upon their returns filed upon March 15, 1947.

12. By striking from the Conclusions of Law, paragraph II, the word “earned” upon the grounds that plaintiff William P. Neil “earned” no portion of the partnership income.

13. By striking from the Conclusions of Law,

paragraph II, the words “\$28,568.21, \$14,284.10, and \$14,283.11” and inserting therein the following words, respectively, “\$19,456.39, \$9,728.19, and \$9,728.20” upon the grounds that taxable income of the plaintiffs for the calendar year 1946 was established to be such by the facts and evidence herein.

14. By striking from the Conclusions of Law, paragraph IV, the word “properly” and inserting the word “improperly” upon the grounds that the facts and evidence herein clearly show that plaintiffs overpaid their income taxes for the calendar year 1946.

15. By striking the entire “Conclusions of Law” upon the grounds that the court having stated in its “opinion” that the “equities are with the plaintiffs in this action and they should not be called upon to pay tax on income which they did not actually receive or benefit from” cannot adopt Conclusions of Law supporting an adverse judgment against plaintiffs. In *Eisner vs. Macomber*, 252 U.S. 189, the Supreme Court defined “income” as [51] “The gain derived from capital, from labor, or from both combined provided it be understood to include profit gained through a sale or conversion of capital assets”. The Sixteenth Amendment to the Constitution of the United States limits the power of Congress to tax as income what is not in fact income. It must be income in truth and substance without regard to form. This limitation is not to be overridden by Congress or disregarded by the courts (*Montgomery’s Federal Income Taxes on Corporations and Partnerships*, 1948-49, Volume I, page 4).

Said motion will be made and based upon this notice, and upon the pleadings, papers, records and files in this action.

Dated this 12th day of June, 1951.

/s/ PRESTON D. OREM,  
Attorneys for Plaintiffs. [52]

Affidavit of Service by Mail attached. [53]

[Endorsed]: Filed June 14, 1951.

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United States District Court, Southern Division of  
California, Central Division

Date: July 16, 1951                      At Los Angeles, Calif.

[Title of Cause.]

Present:

The Hon. Harry C. Westover, District Judge.

Deputy Clerk, E. M. Enstrom, Jr. Reporter, S. J. Trainor. Counsel for Plaintiff, P. D. Orem. Counsel for Defendant: Eugene Harpole, Spec. Att'y, Bur. Int. Rev.

### MINUTES OF THE COURT

Nature of Proceedings:

1. Hearing motion of plaintiffs, filed June 14, 1951, to vacate judgment.
2. Hearing motion of plaintiffs, filed June 14, 1951, for new trial.
3. Hearing motion of plaintiffs, filed June 14,

1951, to amend findings of fact and conclusions of law.

Ruling:

Ordered: motions denied.

EDMUND L. SMITH,  
Clerk,  
By E. M. ENSTROM, Jr.,  
Deputy Clerk.

[54]

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[Title of District Court and Causes 12,041-12,042.]

### NOTICE OF APPEAL

Notice is hereby given that Mary Neil and William P. Neil, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 7, 1951, in the above entitled consolidated cases. Said plaintiffs further appeal from the order of the court denying plaintiffs motion to vacate and set aside the said judgment, which said order was made and entered on or about July 16, 1951.

/s/ PRESTON D. OREM,  
Attorney for Appellants Mary Neil and William P.  
Neil.

[55]

[Endorsed]: Filed July 30, 1951.

[Title of District Court and Causes 12,041-12,042.]

## DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The plaintiffs above named now designate the portion of the record, proceedings and evidence herein to be contained in the record on appeal in the foregoing consolidated cases, as follows:

1. The Complaints in each action.
2. The Answers in each action.
3. Stipulation of Facts, together with all eight of the original exhibits referred to in the Stipulation of Facts and filed with the Court.
4. Opinion. [56]
5. Findings of Fact and Conclusions of Law, together with the direction for the entry of judgment thereon.
6. Judgment.
7. Notice of Motion to Vacate Judgment.
8. Notice of Motion for New Trial.
9. Notice of Motion to amend Findings of Fact and Conclusions of Law.
10. Minute Orders of Court denying the respective motions to vacate judgment, for new trial, and to amend the findings.

## STATEMENT OF POINTS

Plaintiffs intend to rely upon the following points in connection with their appeal:

1. That Judge Harry C. Westover, who presided at the trial of this action, was disqualified to



try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code. Therefore, plaintiff's motion to vacate the judgment should have been granted.

2. That the distributive share of plaintiffs in the partnership income of the partnership of William P. Neil and Le Roy D. Owen, partners in a real estate brokerage business under the name of Le Roy D. Owen Co., for the calendar year 1946, was \$19,456.39, and not \$28,568.21 as found by the Court. Therefore, plaintiffs should prevail in these actions.

Dated: August 1, 1951.

/s/ PRESTON D. OREM,  
Attorney for Appellants Mary Neil and William P.  
Neil. [57]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 2, 1951.

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[Title of District Court and Causes 12,041-12,042.]

### COUNTER DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes Now the Defendant - Appellee, United States of America, and hereby designates in addition to those portions of the record and proceedings in each of the above entitled cases, designated by plaintiffs-appellants herein, the following portions of record and proceedings to be contained in

the record on appeal of these cases to the United States Court of Appeals for the Ninth Circuit as follows:

1. Minute Order of Court dated January 8, 1951.
2. Transcript of Proceedings of January 8, 1951.
3. Minute Order of Court dated April 2, 1951.
4. Transcript of Proceedings of April 2, 1951.
5. Transcript of Proceedings of July 16, 1951.

Dated: This 7th day of August, 1951.

ERNEST A. TOLIN,  
United States Attorney,  
  
E. H. MITCHELL and  
EDWARD R. McHALE,  
Assistant U. S. Attorneys,  
  
EUGENE HARPOLE and  
FRANK W. MAHONEY,  
Special Attorneys,  
Bureau of Internal Revenue.

/s/ By EUGENE HARPOLE,  
Attorneys for United States of America, Defendant-Appellee. [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed Aug. 8, 1951.



[Title of District Court and Causes 12,041-12,042.]

ORDER FOR EXTENSION OF TIME TO FILE  
RECORD ON APPEAL

The Motion of the Plaintiffs herein for an extension of time to file the record on appeal with the Circuit Court of Appeals for the Ninth Circuit, to allow an additional thirty (30) days to and including the 9th day of October, 1951 for the purpose of filing said record on appeal with the said Circuit Court of Appeals for the Ninth Circuit, having been filed and good cause having been shown for the granting of said Motion;

It Is Ordered that the plaintiffs herein shall have an extension of time to and including the 9th day of October, 1951 for the purpose of filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 4th day of September, 1951.

/s/ HARRY C. WESTOVER,  
United States District Judge. [62]

[Endorsed]: Filed September 4, 1951.

[Title of District Court and Causes 12,041-12,042.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 62, inclusive, contain the original Complaint and Answer in each of the above entitled causes; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion to Vacate Judgment; Notice of Motion for New Trial; Notice of Motion to Amend Findings of Fact and Conclusions of Law; Notice of Appeal; Two Designations of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of minute orders entered January 8, April 2 and July 16, 1951 which together with original Joint Exhibit No. 1 and original reporter's transcript of proceedings on January 8, April 2 and July 16, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 21st day of September, A.D. 1951.

[Seal]

EDMUND L. SMITH,  
Clerk.

/s/ By THEODORE HOCKE,  
Chief Deputy.

[Title of District Court and Causes 12,041-12,042.]

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California,

January 8, 1951, 10:00 o'clock a.m

The Clerk: No. 12041 and No. 12042, Neil vs. U.S.A.

Mr. Orem: I would like to direct attention to the fact that the period during which these taxes were assessed was while the court was Collector of Internal Revenue.

The Court: Well, I know nothing at all of this case.

Mr. Orem: I would just as soon keep it here.

The Court: If you have any objection, I will be glad to transfer it out.

Mr. Orem: I think we can stipulate——

Mr. Mitchell: I think it will take two days to try this.

The Court: First, I want to know, are you willing for this court to try the issues?

Mr. Mitchell: The government is, of course.

Mr. Orem: I am agreeable.

The Court: How many days will it take?

Mr. Orem: The facts have to be proven. Probably two days is not too long.

Mr. Mitchell: We will stipulate, of course, all verifiable facts that are material.

The Court: How about April 2nd?

Mr. Mitchell: That is agreeable.

Mr. Orem: Satisfactory.

The Court: I will make an order consolidating the two cases at this time.

(Thereupon, an adjournment was taken until April 2, 1951.)

Monday, April 2, 1951, 10:00 a.m.

The Clerk: No. 12041 and No. 12042, Neil vs. U.S.A.

Mr. Orem: Ready for the plaintiff.

Mr. Mitchell: Ready for the defendant. The parties have reduced the facts to a written stipulation of facts and exhibits which we now file with the clerk.

The Court: If you have stipulated as to the facts, what is there left in this case?

Mr. Orem: Testimony as to two points, your Honor, which I can testify to myself, a couple of points Mr. Mahoney wasn't able to check with the auditor. There is one thing the auditor didn't check, I know, but I can testify to that myself. It won't take over five minutes.

There is also a stipulation which more or less amends Article 11 of this stipulation of facts.

The Court: Before proceeding with this case, I have raised this issue before, and you said you were perfectly willing to continue with the matter. I also want to raise it again, because I don't want you to come in a little later on and say you have been penalized in any way. It appears from the pleadings that when this income tax return was originally filed, I was Collector of Internal Revenue. I said once

before I never heard of the case, don't know anything about the case. I don't know any reason in the world why I would be biased or prejudiced for or against either party, but I am bringing it to your attention right now.

Mr. Orem: At the time before, Mr. Mitchell and myself both indicated we had no objection. In our stipulation of facts, we recite when you were Collector of Internal Revenue, so that again covers it. I again have no objection.

Mr. Mitchell: No objection on the part of the defendant, your Honor.

The Court: I want to be sure to have that in the record, because I don't want you a year from now or two years from now to say anything about it. All right, we can dispose of this tomorrow morning.

Mr. Orem: There is only one thing. There has been a trial brief filed by Mr. Mahoney. I didn't file one because I wanted to see whether we could get together on the facts.

The Court: Yes, there was a trial brief filed by the government. I don't know what the court can do when counsel don't follow the rules. I suppose if one counsel files a memorandum and one does not, we can take the statements in the one filed as true. I don't know.

Mr. Orem: I contemplate asking that the court allow us to file concurrent briefs.

The Court: Suppose we continue the matter to 10:00 o'clock in the morning. In the meantime I will have a chance to read your stipulation and look at your exhibits, and we can probably dispose of the



case tomorrow. Continue it until 10:00 o'clock tomorrow morning.

Monday, July 16, 1951, 10:00 a.m.

The Clerk: No. 12041 and 12042, Neil vs. U. S. A.

Mr. Mitchell: Ready, your Honor.

Mr. Orem: Ready.

Would your Honor like to hear an argument at this time?

The Court: I am not interested in an argument. However, if you want an argument, I will let you argue.

Mr. Orem: I am making a motion at this time to the effect that the court should disqualify himself from hearing any of these matters under Section 455.

The Court: You know, that doctrine is a personal doctrine, and if you can make an affidavit to the effect that I have a personal bias and prejudice against your clients, I would be glad to hear from you. But just a general affidavit is not sufficient.

Not only that, but I called your attention to the fact that I had been formerly Collector of Internal Revenue and I offered to transfer the case out of this court. I am certainly not going to disqualify myself after the case has been heard and I have rendered a decision.

Mr. Orem: It is my position that section is mandatory and not discretionary. The first part is mandatory.

The Court: I don't agree with you. Maybe the Circuit Court will, but I don't. I leaned over backwards to try to bring home to all these litigants that

have tax problems before that if they feel I have any bias or prejudice at all, I am glad to disqualify myself. As a general rule, as I did in this case, I got your consent before we ever proceeded.

Mr. Orem: That is true.

The Court: On two different occasions.

Mr. Orem: My motion is based on prejudice as a matter of law and not a personal prejudice.

The Court: I disagree. Your motion is denied.

Mr. Orem: Very well. Would the court care to hear an argument on the merits?

The Court: No. I am satisfied with the evidence. I am satisfied with the decision. The Circuit Court may not agree with me, but if they don't, that is too bad.

The motions are denied.

[Endorsed]: Filed Sept. 10, 1951.

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[Endorsed]: No. 13109. United States Court of Appeals for the Ninth Circuit. Mary Neil and William P. Neil, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 24, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 13,109

MARY NEIL and WILLIAM P. NEIL,  
Plaintiffs and Appellants,  
vs.

UNITED STATES OF AMERICA,  
Defendant and Respondent.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD

Appellants will rely upon the following points:

1. That Judge Harry C. Westover, who presided at the trial of this action, was disqualified to try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code. Therefore, appellants' motion to vacate the judgment should have been granted.

(a) Harry C. Westover, having been the Collector of Internal Revenue for the Sixth District of California at all times during the calendar year 1946, for which year the claims for refund of income taxes were made which form the subject matter of this case, and the income tax returns for that year having been filed and income taxes assessed thereon having been paid entirely within the said Sixth District of California, the judge who presided at the trial of this action in the lower court is the same person who was charged by law with the collection of the very income tax payments which are

now asked to be refunded. (Section 3641, Internal Revenue Code.)

(b) Therefore, Judge Harry C. Westover as said Collector of Internal Revenue, had a "substantial interest" in the collection of the income taxes to which this case relates, and was also an employee, agent and counsel for respondent in the collection of said taxes. Under said Section 455, therefore, the mandatory disqualification of the said trial judge is apparent.

(c) The consent of all parties to the action to the trial of the case by a judge who is subject to a mandatory disqualification under the provisions of said Section 455 does not remove the disability and he was disqualified despite the consent of appellant to his trial of the case.

2. Appellants are subject to income tax for the year 1946 only upon that portion of the partnership income of Roy D. Owen Company, a partnership composed of Le Roy D. Owen and William P. Neil, which was distributed or distributable to appellants during the year 1946.

(a) That appellants having been assessed, and having paid, income taxes for the year 1946 on \$28,568.21 of income from the said partnership and the share of said income distributed, and distributable, to appellants being \$19,456.39, they, having requested a refund of income taxes only upon partnership income in the amount of \$9,111.82, should be granted such a refund of income taxes.

(b) Where the interpretation of a federal statute is dependent upon the application of a state law, the

state rule will be followed. Accordingly, the \$9,111.82 of partnership income not being distributable to appellants during the year 1946 under the California laws relating to illegal partnerships, is not distributable to appellants within the provisions of the Internal Revenue Code relating to partnership income.

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### DESIGNATION OF RECORD

Appellants designate for inclusion in the record on appeal, all such portions of the record, proceedings and evidence as are included in the typewritten transcript of the record received by this court from the clerk of the District Court in the above entitled cause, and the reporter's transcript in the above cause.

Dated: September 28, 1951.

/s/ PRESTON D. OREM,  
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sep. 29, 1951. Paul P. O'Brien,  
Clerk.

